DRIVING UNDER THE INFLUENCE

Fields v. Com., 2009 WL 875327 (Ky. App. 2009)

FACTS: On Dec. 6, 2006, Nicholasville officers were sent to investigate a disturbance in a local parking lot. They found Fields "yelling, screaming and shouting profanities at other individuals." She was arrested for DUI, resisting arrest and disorderly conduct.

At trial, a witness testified that when she arrived at the restaurant, she saw Fields' SUV in a handicapped parking place. She thought the vehicle was preparing to back out of the space because the "brake lights and back-up lights were illuminated." She waited, but the vehicle did not back up, so she parked. When the witness got out, she could hear the SUV running. Two of the witness's passengers testified to the same information. Officer White (Nicholasville PD) testified that when he arrived, Fields was out of her car and very belligerent. He believed her to be very "extremely intoxicated." As he and Officer Resor arrested her, she struggled and pulled away from him, flailing her arms. Eventually, they got her into custody.

Fields was convicted, and appealed.

ISSUE: Is evidence that a vehicle is running proof that the driver is in physical control of it?

HOLDING: Yes

DISCUSSION: With respect to the DUI, Fields argued that she was not operating or in physical control of her vehicle. She explained that when she used the remote keyless entry to unlock her vehicle that the lights would come on automatically. She claimed she never started the vehicle. The Court looked to the four factors in Wells v. Com.[1] and found that the prosecution had presented sufficient information that the vehicle was, in fact, running, particularly since that feature of the car would have only illuminated the lights for about 40 seconds, a much shorter time than the witnesses claimed. Further, this indicated that she intended to drive the vehicle.

Fields' conviction was affirmed.

Hoppenjans v. Com., 299 S.W. 3d 290 (Ky. App. 2009)

FACTS: At Hoppenjans' trial for DUI, the arresting officer mentioned that he refused to take a PBT. Hoppenjans made a timely objection and asked for a mistrial, which the trial court denied. The judge did admonish the jury to disregard the testimony, and the court legally presumes that a jury will follow such admonitions. Hoppenjans was convicted of DUI, and appealed to the Circuit Court, which also affirmed. He further appealed.

ISSUE: Is the mention of a PBT improper in trial testimony?

HOLDING: Yes

[1] 709 S.W. 2d 847 (Ky. App. 1986).

DISCUSSION: The Court noted that the improper testimony came in during direct examination when the "prosecutor asked the arresting officer to describe the traffic stop of Hoppenjans." The officer described his "performance on various coordination tests," and was them prompted by "what did you do next?" The officer then "discussed the PBT and Hoppenjans's refusal to take the test."

The Court concluded that the trial court had no reason to find that the jury would have failed to follow the admonition. However, it noted that the "holding in this matter should not be construed as an approval of the admission of this type of evidence." Kentucky law is clear that such evidence is prohibited[2] and "prosecutors and police officers participating in DUI cases should be fully aware of these rules." Further, the Court noted "this type of error should be easily avoidable with proper preparation of witnesses."

Hoppenjans's conviction was affirmed.

Litteral v. Com., 282 S.W.3d 331 (Ky.App. 2009)

FACTS: On the day in question, Officer Combs (Lexington PD) arrested Litteral for DUI and took him to the jail. There, he explained Litteral's rights, and Litteral called his sister, an attorney, during the waiting period. "Officer Combs remained in close proximity to Litteral while he was attempting to communicate with his attorney."

Litteral took a conditional guilty plea and appealed.

ISSUE: Does an arrested DUI subject have a right to confer privately with an attorney prior to taking the Intoxilyzer?

HOLDING: No

DISCUSSION: Litteral argued that the test results should have been excluded because he did not have the opportunity to consult privately with his attorney. The Court reviewed the history of the implied consent law, and concluded that the statutory right "described is very circumscribed" and does not create a right to have counsel present or to consult privately with an attorney - and if the Legislature intended to create such a right, it could easily have done so. (The Court further noted that another statute required that the officer personally observe the subject for 20 minutes.) The Court continued:

> We are convinced that the purpose of this very circumscribed right of access to counsel was to allow independent confirmation of the information conveyed by the law enforcement officer – and then only in a way that does not impact the accuracy of the test itself.

The Court also agreed that inability to actually make contact with an attorney did not relieve the person from an obligation to submit to the test.

Litteral's plea was upheld.

---

[2] KRS 189A.100(1); KRS 189A.104(2).

Little v. Com., 2009 WL 1110336 (Ky.2009)

FACTS: On Aug. 9, 2004, Little collided with a car driven by Sosh, in Meade County. Sosh, her toddler son and another individual in her car were all injured. Little was also injured and transported to the hospital, "but his blood was not drawn until three hours had passed since the accident." The results were .29% at that time.

Witnesses agreed that Little had been drinking prior to the wreck but were unable to agree as to how much. Other witnesses also noted his erratic driving. Deputy Robinson (Meade Co. SO) found beer cans both inside and outside the truck. He was, of course, unsure of Robinson's degree of intoxication at the scene.

Little was eventually indicted on numerous charges related to the wreck; He stood trial. He was convicted and appealed.

ISSUE: May blood tests taken three hours after a wreck be introduced in evidence in a KRS 189A.010(b) prosecution?

HOLDING: Yes

DISCUSSION: Little first argued that it was inappropriate to introduce his four prior convictions for DUI, which occurred between 1995 and 1997. The trial court admitted the convictions under KRE 404(b), as "prior bad acts" that indicated "his intent, knowledge, and absence of mistake regarding driving while intoxicated." The Court, however, found that the introduction of the evidence was error, noting that in Com. v. Ramsey, it had held that "previous DUI convictions do not fall within either the exceptions outlined by KRE 404(b) or those recognized by this Court."[3] The Court agreed that the evidence was "unduly prejudicial" and should not have been admitted.

The Court also noted that the injuries sustained by the passenger in Sosh's car were not serious, a bloodied nose, a cut lip and a cut on her knee. Some year later, she suffered another problem with her knee, but the Court noted no connection between that problem and the wreck. The Court agreed, however, that if the problem with her knee had been proven to have been caused by the wreck, it "could qualify as a serious physical injury because it is reoccurring and does affect the use of her right leg." As such, the charge of first-degree assault was not appropriate in this case.

The Court did find it was appropriate to charge Little with First-Degree Wanton Endangerment with respect to another car he forced off the road. (The driver was uninjured.) Since the evidence indicated he had been drinking before that occurred, the charge was valid.

Finally, the Court agreed it was appropriate to allow the introduction of the blood tests, taken 3 hours after the crash. Little argued that it was error because "KRS 189A.010(2) prohibits the admission of blood tests taken over two hours from the initial arrest to be used to determine blood alcohol levels as evidence for a prosecution under KRS 189A.010(1)(a) or (e)." However, "KRS

[3] 920 S.W.2d 526 (Ky. 1996).

189A.010(2) clearly states that blood tests taken after two hours are admissible in prosecutions under KRS 189A.010(1)(b) or (d)." Since the case was proceeding under (b), the admission of the results was not error.

Little's conviction was overturned because of the KRE 404(b) issue.

Mattingly v. Com., 2009 WL 1098111 (Ky. App. 2009)

FACTS: On Sept. 2, 2007, a KSP trooper spotted Mattingly "driving a golf cart with a mixed drink in her hand" on a private road in Grayson County. She admitted drinking an alcoholic beverage and failed several FSTs. She was arrested and charged with DUI and having an open container of alcohol in a motor vehicle.

She moved to dismiss, arguing that the golf cart was not a motor vehicle under KRS 189A.010 and that it was not operated on a public highway. The trial court denied the motion and she took a conditional guilty plea. She then appealed.

ISSUE: Is a golf cart a motor vehicle for purposes of KRS 189A.010?

HOLDING: Yes

DISCUSSION: Mattingly continued her argument that a golf cart was not a motor vehicle. Since KRS 189A.010 does not give a specific definition for motor vehicle, Mattingly argued that the Court should use the definition under KRS 189.010(19) which indicates a motor vehicle "is a motorized transportation agent used for the purpose of transporting people or property over or upon the public highways of the Commonwealth." Because golf carts were not legally driven on the public roadways at the time, she claimed the definition did not include golf carts.

The Court, however, stated that since the definition in KRS 189 "was for the use of that term as used in that chapter and not necessarily as used in KRS Chapter 189A," it must instead "go to the common usage and approved usage of the term." The golf cart had motors and rubber tires and was being operated on a private road in a subdivision. That road was shared with vehicles and by driving on the road, she was placing others in danger.

The decision of the trial court was affirmed.

Smith v. Com., 2009 WL 276794 (Ky. App. 2009)

FACTS: Smith was indicted in Jefferson County on November 1, 2005, charging him with a DUI that occurred on October 24, 2005. On the date of the indictment, he'd had three convictions, but the third conviction actually occurred after the DUI for which he was charged. (The offense on October 24, 2004 "was his third chronological citation for DUI but his fourth conviction, due to his subsequent June 2005 citation and conviction.") He took a conditional guilty plea and appealed.

ISSUE: Does the date of a citation or a conviction control for subsequent DUI charges?

HOLDING: Conviction

DISCUSSION: The Court quickly determined that the date of conviction, not the date of citation, which controlled.[4] As such, the enhancement for the fourth DUI was appropriate.

Smith's conditional guilty plea was affirmed.

Tejeda v. Com., 2009 WL 4060176 (Ky. App. 2009)

FACTS: On November 20, 2006, Officer Curry (KVE) learned of an accident on I-75, in Laurel County. He spotted a vehicle of which he'd earlier received a complaint, a white Mustang, "maneuvering around road debris and eventually stalling." A truck assisted in pushing the vehicle off the highway. Officer Foster went to investigate and the driver, Tejeda, explained his car had run out of fuel. Officer Foster agreed to call for a wrecker and returned to where Curry was working the wreck.

He told Foster that "he thought he had detected the smell of alcohol on Tejeda's breath." Officer Currey went to check and eventually "administered several field sobriety tests which Tejeda was either unable to complete or 'failed.'" Tejeda agreed that he had been drinking when approached but denied having been drinking prior to running out of fuel. He was arrested for DUI.

Tejeda moved for suppression. The trial court agreed that he had not been in "actual physical control of an operable vehicle" and therefore could not be convicted of DUI. His charges were dismissed. The Commonwealth appealed and the Circuit Court agreed that the matter was one for the jury to decide. Tejeda appealed.

ISSUE: Is a decision about whether a vehicle is in control of the driver a matter for the jury?

HOLDING: Yes

DISCUSSION: The Court ruled that the issue was whether the officers had the right to make an investigatory stop of the vehicle. The Court agreed they did, and although the "timing of the alcohol consumption" could be debated, the facts before the officers supported probable cause that "Tejeda had operated the vehicle while under the influence." As such, it was proper for the case to go to the jury and remanded the matter back to the trial court for further proceedings.

Wilson v. Com., 2009 WL 960750 (Ky. App. 2009)

FACTS: On Aug. 16, 2006, Officer Goodwin (Middlesboro PD) made a traffic stop of Wilson after Wilson backed out of a driveway, squealing and spinning tires. When Officer Goodwin approached, he "smelled alcohol." Wilson failed all but one FST, and took a PBT which indicated the presence of alcohol.

[4] Royalty v. Com., 749 S.W.2d 700 (Ky. App. 1988)

Officers Goodwin and Greene searched the car and found syringes and cocaine residue. Wilson refused blood and urine testing at the hospital. He was indicted on numerous traffic related charges. Eventually Wilson was convicted of most of the charges, inducing DUI. He appealed.

ISSUE: May a PBT be mentioned as a Field Sobriety Test?

HOLDING: Yes

DISCUSSION: During Officer Goodwin's testimony, he described the FST's he performed and also mentioned the PBT. He stated the PBT detected the presence of alcohol, and Wilson objected at that time. The officer was cross-examined using the Standardized Field Sobriety Testing and Reference Guide, which included PBTs.

The Court reviewed the statute, KRS 189A.194, and agreed that testimony concerning the PBT detecting the presence of alcohol was not evidence to prove guilt. The Court found it was not error to admit the mention of the PBT, however, as one of several FSTs.

Further, the Court found that the introduction of evidence of cocaine residue was also admissible, as Kentucky subscribes to the "any amount" test, rather than the "usable quantity" approach.

Wilson also argued that the officer's comment on his "bruised and scarred" arms was inappropriate, but the count concluded that its introduction was, at best, harmless error.

Wilson's conviction was affirmed.